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CONSOLIDATED SOAH DOCKET NO. 473-19-1265

CONSOLIDATED PUC DOCKET NO. 48785

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APPLICATION OF ONCOR §  
ELECTRIC DELIVERY CO, AEP §  
TEXAS INC. AND LCRA §  
TRANSMISSION SERVICES §  
CORPORATION TO AMEND §  
THEIR CERTIFICATES OF §  
CONVENIENCE AND NECESSITY §  
FOR 345-KV TRANSMISSION §  
LINES IN PECOS, REEVES, AND §  
WARD COUNTIES, TEXAS §

PUBLIC UTILITY COMMISSION  
BEFORE THE HEARING CLERK

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**COG OPERATING LLC'S  
RESPONSE TO COMMISSION STAFF'S OBJECTIONS TO  
AND  
MOTION TO STRIKE PORTIONS OF TERRY BURKES' DIRECT TESTIMONY**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, COG Operating LLC<sup>1</sup> (Concho) to file this response to Commission Staff's objections to and motion to strike portions of Terry Burkes' direct testimony on behalf of Concho. Concho urges the administrative law judges (ALJs) to overrule Staff's objections and deny Staff's motion to strike portions of Mr. Burkes' direct testimony. To support its position, Concho respectfully shows:

**I. Background**

On January 10, 2019, Terry Burkes submitted direct testimony on behalf of Concho. On January 18, 2019, the Staff of the Public Utility Commission of Texas objected to and moved to strike portions of Mr. Burkes' testimony. This response is timely filed under SOAH Order No. 2, issued on December 10, 2018.

**II. Staff's objections and motion to strike**

Staff objects to and requests that portions of Mr. Burkes' direct testimony regarding anticipated future uses of property be stricken. Staff contends anticipated future use is not a

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<sup>1</sup> COG Operating LLC operates as a wholly-owned subsidiary of Concho Resources Inc.

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relevant consideration in approving or routing a transmission line because nothing in the Public Utility Regulatory Act (PURA) or the Commission's rules lists future use as a factor to be considered by the Commission. Another basis for Staff's objection is future use of property is speculative because it may or may not occur and cannot be a factor in locating a transmission line.<sup>2</sup>

The Staff offers an alternative position that does not require striking intervenor testimony. Staff's motion states that if the ALJ finds these portions of direct testimony to be general statements of concern reflecting community values and declines to strike them, Staff requests the ALJ accord such testimony the appropriate weight.<sup>3</sup>

**III. Concho's response**

Concho first includes below the table of Staff's objections with Concho's abbreviated responses, then makes its argument below the table.

|                                     |   |            |   |
|-------------------------------------|---|------------|---|
| Terry Burkes<br>(COG Operating LLC) | 11:14-15<br>(The – J1)  | Future use | Concho's reference to concern about future development on Link J1 further develops its concerns about construction of the transmission line project. Mr. Burkes does not identify specific wells or development plans or provide this statement as support for a proposed modification. |
|                                     | Running objection to all references to link J1 throughout testimony, including references in figures and attachments, except the reference located at 14:2. | Future use | Although Link J1 threatens no existing wells, Concho's development of the area is not uncertain or speculative. It has been delayed because of the  |

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<sup>2</sup> Staff's Objections and Motion to Strike at 1-2.

<sup>3</sup> *Id.* at 10.

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|  |                             |            |   |
|--|-----------------------------|------------|---|
|  |                             |            | <p>need to build the proposed transmission line. Without input from Concho, the Commission is prevented from knowing the effect of the project on ongoing development.</p>  |
|  | 13:4-5<br>(and - locations) | Future use | <p>Mr. Burkes refers to an existing facility Link F3 will cross near. Mr. Burkes' F3 modification avoids that existing facility. An additional benefit of the modification is that it will minimize the effect on the future development in that field.</p> |
|  | 13:6<br>(and - field)       | Future use | <p>Concho supports a modification to move the project away from an existing well. The modification also will minimize the effect on ongoing well locations, a benefit to consider whether to make the modification to avoid an existing well.</p>           |
|  | 14:2-4<br>(but-concern)     | Future use | <p>Concho's development is ongoing and not speculative. The Commission likely will not decide this case until May or after. It will take months or longer for Oncor and AEP to construct the project. Concho's advice it likely</p>                         |

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|  |                       |            |  |
|--|-----------------------|------------|--|
|  | 16:19<br>(and future) | Future use | will construct facilities this year gives Oncor and AEP information about ongoing construction on this link.<br><br>Mr. Burkes' D31 modification avoids an existing facility. An additional benefit of the modification is that it will minimize the effect on the future development in that field. |
|  | 17:3<br>(and planned) | Future use | The Commission must moderate the impact on the affected community and landowners. Without input from Concho on its existing, ongoing, and planned development, the Commission is prohibited from knowing the impact of the transmission line on the community and Concho.                            |

**1. Because the project is necessary to meet future needs, the Commission should consider how the project may affect the oil and gas producers whose current and future development creates the need for the project.**

The Electric Reliability Council of Texas (ERCOT) deemed this transmission line as critical to the reliability of the ERCOT system.<sup>4</sup> In their application, Oncor Electric Delivery Co. (Oncor) and AEP Texas Inc. (AEP) describe their request to ERCOT for the critical designation.<sup>5</sup> The companies described the acceleration of load growth being experienced in the

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<sup>4</sup> Order of Referral and Preliminary Order at 2.

<sup>5</sup> Application at 12.

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region and the criticality of 345 kV service to the reliability of the area. Load growth has surpassed ERCOT's expected load serving capability for existing planned oil and gas projects. The purpose of the proposed transmission line is to meet demand for future use. It would be illogical to ignore testimony providing information about current, ongoing, and future developments that require this critical project in the same way it would be illogical to prevent the Commission from considering the purpose of this project – future electricity needs in a growing area of West Texas that is important to the local and Texas economies.

In its application, Oncor states it provided ERCOT information “about additional loads not yet under contract as of the study date, but which were known to want service in the near future to ERCOT.”<sup>6</sup> Those loads include the future development of mineral resources by producers like Concho. “ERCOT recommended the Proposed Transmission Line Project as one of the components that would provide the most effective solution to meet reliability needs and provide infrastructure to accommodate future load growth.”<sup>7</sup> Concho's Midland Basin development is part of the future load growth this project accommodates. Because the project is necessary to meet future needs, the Commission should consider how the transmission line project may affect the oil and gas producers whose current, ongoing, and future development create the demand for this project.

**2. The Commission's rules do not preclude it from considering Concho's ongoing and future development.**

While its rules do not require the Commission to consider future oil and gas development, the Commission is not prohibited from considering the impact on Concho's future development or modifications that may have a less negative impact on Concho's future development. The Commission's Order of Referral to SOAH states, “This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ or by the Commission in future orders issued in this docket.”<sup>8</sup> The list of issues not to be addressed only

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<sup>6</sup> *Id.* at 14.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> Order of Referral and Preliminary Order at 5.

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includes compensation for right-of-way or condemnation of property.<sup>9</sup> Concho's information about its ongoing and future development is not related to the issues not to be addressed. Concho raises its concerns about placing the transmission line because its wells are engineering constraints that should be avoided for economic, health, and safety reasons.<sup>10</sup>

The Commission's Order of Referral also asks if there are "alternative routes or facilities configurations that would have a less negative impact on landowners."<sup>11</sup> Granting Staff's Objections and Motion to Strike will prevent Concho from providing evidence. The Commission also asks "What would be the incremental cost of those routes?" Concho is working with Oncor and Oxy to provide information about the cost of its requested and supported modifications.

As listed in the table below, several of Mr. Burkes' references to Concho's future development support modifications to proposed links to avoid engineering constraints with existing wells. When Mr. Burkes states Concho's proposed modifications will have less effect on future development, he is not asking for a modification to accommodate future development but providing additional evidence as support and another reason to modify the proposed link to avoid existing wells. The reduced effect on future development is a bonus that the Commission should not ignore.

### **3. The case Staff cites addresses the speculative nature of real estate development – not mineral production.**

The case upon which Staff bases its opposition to future use testimony is distinguishable here. First, a proposed airstrip was not on the approved route, so the Commission did not take a position regarding the proposed airstrip. Second, the Staff bases its argument on a Commission statement about post-notice changes affecting routes. The ALJs recommended the Commission continue to evaluate post-notice changes on a case-by-case basis. The Commission responded to the ALJs' suggestions:

Such future developments and plans are too indefinite as to where or how potential routing areas will be affected and, as such, are irrelevant to this Commission's decision. Further, current

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<sup>9</sup> *Id.* at 6.

<sup>10</sup> Burkes direct at 5.

<sup>11</sup> Order of Referral and Preliminary Order at 5.

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Commission rules require neither the utility nor the Commission to view this as a criterion in selecting the best route.<sup>12</sup>

In 2006, the Commission concluded future real estate developments and plans are indefinite. That conclusion says nothing about the Commission's position on considering oil and gas development in West Texas. The locations of Concho's planned development are known and part of Concho's ongoing development, they are not post-notice. The next point describes how quickly oil and gas development occurs and the Commission's recent willingness to approve modifications to transmission line projects to accommodate oil and gas development.

#### **4. Oil and gas development differs from residential development and should be considered in routing the project and making modifications.**

Concho's oil and gas development is ongoing. All wells are not drilled, partly because Concho needs the power this project will supply, but the plans are in place and the infrastructure begun to develop Concho's holdings in the Midland and Permian Basins. Commission Staff does not object to Mr. Burkes' description of oil and gas development in the Midland and Permian Basins or the speed with which new wells can be drilled.

Oil and gas development in West Texas is rapid, however, and development continues to increase. Companies like Concho will drill and develop the Midland and Permian Basins. The need for the new transmission lines is because of the new oil and gas development that—often—is waiting on new transmission services. When Concho decides to drill a new well, the well site is surveyed and the company files a permit application at the Railroad Commission. *From the time the company makes its decision to the time drilling starts on a well, the process can take as little as three weeks.*<sup>13</sup>

Mr. Burkes testifies he understands the Commission does not consider future real estate development in transmission line cases. He agrees that policy is understandable, given the speculative nature of some real estate development. Mr. Burkes discussed, however, how quickly engineering constraints in the oil and gas industries progress:

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<sup>12</sup> *Application of LCRA Transmission Services Corporation to Amend Its Certificate of Convenience and Necessity for a 138-kV Transmission Line in Kendall and Bexar Counties*, Docket No. 29684, Order on Rehearing at 4 (Mar. 22, 2006).

<sup>13</sup> Burkes Direct at 6. (Emphasis added.)



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Because development in the study area is progressing quickly, the location of facilities along whatever route the Commission approves likely will differ from what the applicants considered when they prepared their application. Because new constraints likely will arise before (and even during) the time Oncor and AEP construct this project, Concho supports the Commission giving Oncor and AEP additional flexibility to modify the approved route so it can be constructed in a safe and reliable manner. Avoiding engineering constraints, consistent with good utility practice, should be a goal of this project.

While the Commission may give little weight to hoped-for real estate developments, the oil and gas business is a complex process that can involve years of planning and expenditure of hundreds of thousands of dollars to reach the stage Concho is now in. Drilling wells is the last step in the process and the planning Concho has undertaken to properly develop assets in West Texas removes the charge of speculation that may apply to some real estate plans. Concho's development plans are not speculative or prospective.

### **5. The Commission should consider the impact on Concho's future development to moderate the impact on the community and landowners.**

In its listing of the factors the Commission is to consider included in PURA and the Commission's rules, Commission Staff overlooks an important part of the Commission's rule. An application must address the criteria in PURA, engineering constraints, and costs, but the rule requires the line to be routed to moderate the impact on the affected community and landowners unless grid reliability and security dictate otherwise.<sup>14</sup> In this part of West Texas, oil and gas producers and mineral production are significant parts of the community. Without hearing from Concho and affected landowners (and mineral rights owners)<sup>15</sup> in the community about future production plans, the Staff would have the Commission fail to consider the impact of the transmission line on the affected community and landowners and on a significant part of the local and Texas economies.

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<sup>14</sup> 16 Texas Administrative Code 25.101(b)(3)(B).

<sup>15</sup> While the rule refers to landowners, Texas courts have long held that the mineral estate is the dominant estate, and that the mineral owner, or the owner's lessee, has an implied easement to use the surface in a manner that is reasonably necessary to develop the minerals.

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**IV. Conclusion and prayer**

It appears Staff searched for the words “future” and “plans” in Mr. Burkes' testimony, then reflexively moved to strike any words related to Concho's ongoing or future development without considering context or the benefit to the fact finders in this proceeding. Mr. Burke recommended no modifications for future development. He did refer to the benefits of Concho's proposed modifications to avoid existing facilities on future development. While Concho requests the transmission line avoid existing wells, the added benefit of not negatively affecting ongoing development in those same fields should not be stricken. Minimizing the impact of the project on future development is a bonus to the decision to avoid existing wells for safety and other reasons. Any modification to avoid existing wells prudently should consider what the modification will affect. Those on the ground know this information and Mr. Burkes provides it in his testimony.

Staff's alternative position gives Concho little solace. Concho's information about its ongoing development goes beyond a general statement of concern reflecting community values and the weight accorded to how the transmission project will affect Concho's ongoing and future development should be greater than minimal “appropriate weight.”

WHEREFORE, PREMISES CONSIDERED, COG Operating LLC respectfully requests the ALJs overrule the Staff's objections, deny Staff's motion to strike portions of Mr. Burkes' testimony, and grant such further relief to which Concho may be entitled.

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Respectfully submitted,

**BAYLIFF LAW FIRM PLLC**

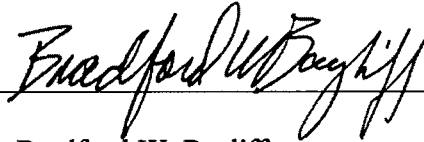
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**ATTORNEY FOR COG OPERATING LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of January 2019, the foregoing document is being filed with the Public Utility Commission's Central Records office for posting on its Interchange system and served via email on Commission Staff.



Bradford W. Bayliff